



November 14, 2011

Via E-mail: comments-pacificnorthwest-wallowa-whitman-whitmanunit@fs.fed.us
Cc: jtomac@fs.fed.us; smillar@fs.fed.us

Whitman Ranger District
PO Box 947
Baker City, OR 97814

Re: Scoping Comments on Granite Creek Watershed Mining Plans Proposal

Dear Ranger Tomac,

Please accept these comments on behalf of the Hells Canyon Preservation Council ("HCPC") regarding the Granite Creek Watershed Mining Plans proposal. HCPC is a non-profit conservation organization based in La Grande, OR with approximately 1,000 members. HCPC's mission is to protect and restore the inspiring wildlands, pure waters, unique habitats and biodiversity of the Hells Canyon-Wallowa and Blue Mountain Ecosystems through advocacy, education and collaboration, advancing science-based policy and protective land management. HCPC actively participates in Forest Service proceedings and decisions concerning the management of public lands within the Wallowa-Whitman and Umatilla National Forests.

HCPC has a longstanding involvement with addressing resource concerns related to mining in this region. We would first like to note that it is very difficult to provide anything but generalized comments at this point in time without having had an opportunity to review the 30 different Proposed Plans of Operations (plans) that will be aggregated for analysis under a single EIS. If possible, it would be very helpful to the interested public if you could provide additional information on the individual proposed plans on the Forest Service's website in the future. HCPC will also be submitting additional comments in collaboration with the Northwest Environmental Defense Center later this week, and asks that you please consider and include in the project record both these scoping comments.

We hope the Forest Service will not make the same mistakes it made when it approved numerous individual mining plans in the North Fork Burnt River via a comprehensive EIS/ROD in 2004 which prompted HCPC and its allies to file suit,

HCPC v. Haines, 2006 WL 2252554 (D.Or. 2006).

Water Quality and Aquatic Habitat

These operations are proposed for the Granite Creek watershed, which encompasses four streams listed on the State of Oregon's 303(d) list for exceeding state temperature or sedimentation standards. No less than five federally listed fish species are also known to occur within this watershed.

Mining roads reduce shade to streams and increase stream temperatures by directly destroying riparian vegetation or retard temperature recovery by preventing trees from growing due to vehicle use and compaction. Ponds used for gold processing sometimes discharge sediment into adjacent streams or breach during high water events resulting in severe sedimentation of downstream aquatic habitat. Remote cabins used by miners also often lack septic systems and long term campsites lack facilities for adequate treatment of human waste. Trailers are often hauled to mining sites along streams and the potential exists for waste water to be discharged onto the ground or into streams.

As the U.S. District Court of Oregon made clear in *HCPC v. Haines*, any mining activity that *may* result in a discharge of pollutants into navigable waters requires Sec. 401 certification pursuant to the Clean Water Act (CWA), [33 U.S.C. § 1341\(a\)\(1\)](#). Without affirmatively demonstrating that there is no possibility for a sediment discharge, the Forest Service also fails to demonstrate compliance with the CWA's anti-degradation policy for 303(d) listed streams. Section 313 of the CWA requires all federal agencies to comply with water quality standards, including a state's anti-degradation policy, [33 U.S.C. § 1323\(a\)](#). This mandate requires the Forest Service to affirmatively demonstrate in its NEPA analysis/Record of Decision that the agency's approved actions will protect water quality and not result in *any* further degradation to a state listed water quality impaired stream. This includes no measurable increase in sedimentation.

As you know, the WWNF and UNF Forest Plans were amended by two regional aquatic conservation strategies, commonly referred to as PACFISH and INFISH, to protect anadromous and inland native fish species. To achieve riparian goals, the plans set Riparian Management Objectives (RMOs) as "criteria against which attainment or progress toward attainment of the riparian goals is measured." INFISH DN at A-2. The RMOs are "good indicators of ecosystem health, are quantifiable, and are subject to accurate, repeatable measurements." *Id.* at A-3. The RMOs include: pool frequency; water temperature (no measurable increase in maximum water temperature, which must be below 59 degrees F in adult holding habitat and below 48 degrees F in spawning and rearing habitats); bank stability (more than 80% stable); lower bank angle

(more than 75% of banks must have an angle of less than 90 degrees); and width/ depth ratio (the mean wetted width divided by mean depth must be under ten). *Id.*

To achieve the RMOs, INFISH Minerals Management standards require the Forest Service to:

Minimize adverse effects to inland native fish species from mineral operations...For operations in a Riparain Habitat Conservation Area ensure operators take all practicable meaasures to maintain, protect, and rehabilitate fish and wildlife habitat which may be affected by the operations. When bonding is required, consider (in the estimation of bond amount) the cost of stabilizing, rehabilitating, and reconstructing the area of operations.” MM-1.

Structures, support facilities, and roads are to be located outside RHCAs (unless no other alternative exists and facilities can be constructed in a way that avoids adverse impacts). MM-2. Roads are to be kept to the absolute minimum and should be closed, obliterated, and revegetated after use. *Id.* Solid and sanitary waste facilities are prohibited in RHCAs. MM-3. INFISH mining standards also require the Forest Service to develop inspection, monitoring, and reporting requirements for mineral activities. MM-6.

As the District Court in *HCPC v. Haines* held, settling ponds are considered structures for the purpose of this standard. Consequently the Forest service must affirmatively demonstrate that any settling ponds, as well as new roads, and any other support facilities cannot be located outside RHCAs. If no such alternative location exists, then the Forest Service must affirmatively demonstrate that such construction is limited to the absolute minimum necessary to carry out the mining activities. The Forest Service must also affirmatively demonstrate that stream buffer widths for activities within RHCAs are adequate to minimize adverse impacts to native fish and that those activities further incorporate all practicable measures to protect and restore affected habitat. The Forest Service must describe how it will meet these obligations in the EIS and any future decisions.

Roads, Off Highway Vehicle Use, Encampments and Occupancy

Access roads and associated dust can cause sedimentation of adjacent streams. Miners use motorized vehicles to access camps and streams via roads, unmaintained routes, and cross country travel. Impacts associated with mining roads and unmaintained routes are increasing. New roads are sometimes constructed or reconstructed by miners with no notification of federal land managers. Both temporary roads and use of OHVs increase the risk of sediment entering the stream-system, facilitate the spread of noxious weeds, and disturb wildlife, HCPC strongly recommends against increasing temporary road mileage or OHV use. Both these

activities would also facilitate increased unauthorized OHV use by non-miners. Given the scarcity and ineffectiveness of enforcement measures to control current unauthorized OHV use, the Forest Service should make every possible effort to avoid adding to this problem.

Forest Plan open road density guidelines provide that the Forest Service must "[m]eet the specific open-road density guidelines found in the direction for individual management areas unless a specific exception is determined, through the Forest Service NEPA process, to be needed to meet management objectives." As the court in *HCPC v. Haines* also made clear, the Forest Service cannot rely on speculative road closures or decommissioning to meet road density standards. If these proposed plans call for a specific exception from the Forest Plan's open-road density guidelines, the Forest Service must affirmatively demonstrate that such exceptions are warranted in order to achieve management objectives.

Miners are also known to construct dwellings and facilities on public lands. Long term camping, trailers, cabins, out houses, road construction, and off highway vehicle use cause soil compaction, soil contamination, chemical and bacterial pollution, litter, vegetation damage, loss of rare plants, increased fire ignitions, decreased wildlife, increased stream bank erosion, and increased sedimentation (Moyle et al.1996; Harvey and Lisle 1998; USFWS 1999; USFWS 2002a; Gaines 2003; Mahrtdt et al. 2002; Sweet 2007; Brodie 2001; Knight and Skagen 1986; summarized in Horizon 2009:4.3-21; Nawa 2002:27). The Forest Service must consider these potential impacts.

Fish, Wildlife and Vegetation

Gold miners generally camp adjacent streams in riparian areas where wildlife use is high. Occupancy of these sites adversely affects fish and wildlife use in the area due to noise, soil disturbance and destruction of vegetation. Encampments and off-road vehicles may adversely affect raptors and declining neo-tropical migrants by altering behavior, altering movements, altering distribution, reducing nesting success, and causing unnecessary expenditure of critical energy reserves (Knight and Skagen cited in Horizon 2009:4.3-21). Soil compaction, soil contamination and loss of shade could also eliminate or reduce populations of rare plants, especially along streams (Shevock 1996 cited in Horizon 2009:3-21). The Forest Service should ensure that additional measures are taken to safeguard those species from adverse impacts.

Forest Wide Standards and Guidelines in the WWNF LRMP specifically rank management and enhancement of water quality and fish habitat as a priority over other uses described or implied in all other forest plan management standards or guidelines. LRMP, 4-22. Simply put, the Forest Plan clearly provides that protecting federally listed fish and their habitat is more important than authorizing mining activities. The Forest Service must demonstrate how management *and* enhancement of water quality and fish

habitat will have priority over authorizing mining activities in an already degraded watershed for the next ten years.

The Forest Service Must Acquire and Analyze Current Population and Trend Data for Relevant Management Indicator Species.

NFMA requires the Forest Service to provide animal and plant diversity in the national forests. 16 U.S.C. § 1604(g)(3)(B). The Forest Service has a duty to manage fish and wildlife habitat “to maintain viable populations of existing native . . . vertebrate species in the planning area.” 36 C.F.R. § 219.19. To achieve this goal, NFMA requires the Forest Service to designate “management indicator species” (“MIS”) in its Forest Plan. MIS are proxies used to measure the effects of Forest Service management strategies on the forest, species diversity and species population viability.

Species selected as MIS are selected because their population changes are believed to indicate the effects of management activities. *See* 36 C.F.R. § 219.19(a)(1). By monitoring and analyzing impacts to MIS, the Forest Service is able to gauge the overall health and trends of other species within the forest, without incurring the time and expense of studying each species individually. 36 C.F.R. § 219.19(a)(1); *see Inland Empire Pub. Lands Council v. U.S. Forest Serv.*, 88 F.3d 754, 762 n.11 (9th Cir. 1996); *The Lands Council v. Powell*, 379 F.3d 738, 753–54 (9th Cir. 2004). NFMA regulations require that “[p]opulation trends of the management indicator species . . . be monitored and relationships to habitat changes determined.” 36 C.F.R. § 219.19(a)(6).

The Forest Service must demonstrate that project level surveys have been conducted and current population data gathered for MIS. The Forest Plan for the WWNF states that the applicable National Forest Management Act (NFMA) implementing regulations require that “fish and wildlife habitat be managed to maintain viable populations of existing . . . species in the planning area.” To insure this, the regulations direct that: (1) “Habitat must be provided to support, at least, a minimum number of reproductive individuals,” and (2) “Habitat must be well-distributed so that those individuals can interact with others in the planning area.” WWFP 2-10.

The point of conducting TES and MIS surveys is to determine population numbers so that viability can be assured and so impacts from management can be known. The WWFP also imposes a forest-wide requirement for surveying for MIS species. WWFP 5-10. In some instances, a habitat model may be used as a proxy to determine MIS viability in lieu of surveys. *Inland Empire Pub. Lands Council*, 88 F.3d 754, 760 n.6 (9th Cir. 1996). However, where the Forest Service's "methodology does not reasonably ensure viable populations of the species at issue," using habitat evaluation as a proxy for monitoring population trends can be deemed arbitrary and capricious. *See Idaho Sporting Congress, Inc. v. Rittenhouse*, 305 F.3d 957, 972 (9th Cir. 2002).

Both steelhead, bull trout, and redband trout are designated MIS on the Wallowa Whitman National Forest. LRMP 2-9. The Forest Service cannot rely upon stale habitat data. *The Lands Council*, 379 F.3d at 748 (Forest Service cannot use 13-year-old fish habitat survey, even where updated by 6-year-old fish count surveys, because "[e]vidence of the current habitat conditions, and any degradation or improvement in the last thirteen years, is relevant evidence"). Without current baseline data, the Forest Service has no means to determine the impacts of mining activities on the viability of these imperiled native fish. In the absence of any systematic effort to collect data and determine population trends, the Forest Service's approval of any plans will be inconsistent with the Forest Plan MIS requirements and therefore arbitrary and capricious. NFMA, its implementing regulations, and subsequent case law require the Forest Service to know what the viable populations of MIS located in the project area are before management prescriptions are applied.

Moreover, NEPA requires the Forest Service to take a "hard look" at the impacts of this project on sensitive and listed fish species and aquatic habitat. The Forest Service is required to "describe the environment of the areas to be affected or created by the alternatives under consideration." 40 C.F.R. § 1502.15. The establishment of the baseline conditions of the affected environment is an essential requirement of the NEPA process. *See Half Moon Bay Fisherman's Marketing Ass'n v. Carlucci*, 857 F.2d 505, 510 (9th Cir. 1988) (Ninth Circuit stated that "without establishing... baseline conditions... there is simply no way to determine what effect [an action] will have on the environment, and consequently, no way to comply with NEPA"). The NEPA process mandates a "coherent and comprehensive up-front environmental analysis to ensure informed decision making to the end that the agency will not act on incomplete information, only to regret its decision after it is too late to correct." *Center for Biological Diversity v. U.S. Forest Service*, 349 F.3d 1157, 1166 (9th Cir. 2003)(internal citations omitted); *see also CBD v. BLM*, 422 F.2d 1115, 1167-1168 (N.D. Ca. 2006)(holding that BLM's approval of a management plan for a recreational sand dunes area was arbitrary and capricious because it was prepared in the absence of current inventories of sensitive species known and likely to occur in the project area).

The Forest Service Must Complete ESA Section 7 Consultation Prior to Authorizing Mining Activities.

As you know, the Forest Service must consult with the U.S. Fish & Wildlife Service and NOAA Fisheries concerning the impacts on listed species of this action. Section 7 of the ESA imposes an affirmative duty upon the Forest Service. This affirmative duty extends to “any action authorized, funded, or carried out by such agency,” including authorizing mining activities on land managed by the federal government. 16 U.S.C. § 1536(a)(2). The ESA requires the Forest Service to consult with NOAA Fisheries and FWS to insure that its authorized mining activities are “not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification” of critical habitat. *Id.* § 1536(a)(2), (a)(4).

Only after the Forest Service complies with § 7(a)(2) can any activity that may affect a protected species go forward. *Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1056–57 (9th Cir. 1994). *See also PCFFA*, 138 F.Supp.2d at 1242 (citing *Pacific Rivers Council*); *Greenpeace v. Nat’l Marine Fisheries Serv.*, 106 F.Supp.2d 1066, 1075 (W.D. Wash. 2000) (“the duty [of consultation created by § 7] must be fulfilled before initiation of agency action”) (emphasis added).

The Forest Service cannot rely on “best management practices” or mitigation measures for ensuring no jeopardy and no adverse habitat modification unless those measures are reasonably specific and certain to occur. *See Ctr. for Biol. Diversity v. Rumsfeld*, 198 F. Supp. 2d 1139, 1152 (D. Ariz. 2002); (Mitigation measures must be “reasonably specific, certain to occur, and capable of implementation; they must be subject to deadlines or otherwise-enforceable obligations; and most important, they must address the threats to the species in a way that satisfies the jeopardy and adverse modification standards.”) A mere expression of intent to implement mitigation measures is inadequate “absent specific and binding plans” for effectuating that intent. *Nat’l Wildlife Fed’n v. NMFS*, 524 F.3d 917, 936 (9th Cir. 2008).

In other words, even if the Forest Service sincerely believes that it is committed to carrying out BMPs, the ESA requires more: the adoption of measures that actually will avoid and/or mitigate harm to listed fish and wildlife. The Ninth Circuit made this clear in invalidating a BiOp in part because NMFS relied on promises of future construction of fish passage on the Columbia River dams that lacked “solid guarantees that they will actually occur.” *Id.* at 935. The Court of Appeals emphasized that not “even a sincere general commitment to future improvements may be included in the proposed action in order to offset its certain immediate negative effects, *absent specific and binding plans.*” *Id.* at 935–36 (emphasis added); *see also Natural Res. Defense Council v. Kempthorne*, 506 F. Supp. 2d 322, 350–57 (E.D. Cal. 2007) (invalidating adaptive management plan that contained “no quantified objectives or required mitigation

measures” and failed to provide a reasonable certainty that necessary mitigation measures would be implemented or admitted adverse impacts mitigated).

Invasive Weeds

Motorized use of mining access roads and cross country routes increases the risk of spreading invasive weeds. The Forest Service should ensure that the owner/operator adequately monitors for and treats noxious weeds, that all equipment is pre-cleaned and that all disturbed areas are reseeded with native vegetation.

Vandalism Associated with Mining Access Roads, Mining Sites, and Mining Camps

Mining access roads and camps attract vandals and recreationists who cause additional resource damage (i.e. cumulative effects). Vandals create motorized routes around locked gates and around boulder blocks which destroys vegetation through compaction. Vandals destroy gates or remove boulders to gain access to mining roads that lead to RHCAs and roadless areas (Nawa 2002; Nawa 2009). The Forest Service must take a hard look at these indirect and cumulative effects.

Thank you for the opportunity to participate in this planning process and for your review of these comments. HCPC looks forward to further discussing these issues, and please feel free to contact me with any questions.

Sincerely,

A handwritten signature in black ink, reading "Jennifer Schwarz". The signature is fluid and cursive, with the first name "Jennifer" and last name "Schwarz" clearly legible.

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